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IN THE

Supreme Court of the United States

October Term, 1964
No. 797

GILES W. STABLER and CLIFFORD V. STABLER, Executors of the Will of RALSTON J. STABLER, also known as R. J. STABLER, also known as RALSTON JOHN STABLER, Deceased,

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the California District Court of Appeal, Second Appellate District, Division Four.

MOTION TO DISMISS OR AFFIRM.

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MOTION TO DISMISS OR AFFIRM.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal or to affirm the judgment of the District Court of Appeal of the State of California for the following reason:

There is no substantial federal question presented as a basis of jurisdiction in this court inasmuch as the questions presented have been foreclosed by previous decisions of this Court.

Statement of Facts.

Appellant engaged in both interstate and intrastate hauling in California. [Clk. Tr. pp. 3 and 4.] The transactions in issue were interstate only. Under such transactions appellant performed *entirely in California* a part of an interstate shipment of goods under a through bill of lading for which a single origin-to-destination charge was made. Appellant received for his services an amount of the through charge determined by agreement of the participating carriers. Because of additional handling, paper work, traffic congestion and other factors affecting appellant, he received more from each shipment than a straight mileage prorate of the through charge would have given him.

Each participating carrier (including appellant) who performed any activity in California considered himself *independently* liable to appellee under the California Motor Vehicle Transportation License Tax, Cal. Rev. and Tax. C. §§ 9601-10505, sometimes hereinafter called "Transportation Tax." Each, except appellant, reported and paid Transportation Tax on each shipment on that proportion of *his own* gross receipts as *his own* California mileage bore to *his own* total mileage. Appellee applied this same measure to appellant. Since all appellant's activities were in California, all his gross receipts were included in the tax measure and no mileage calculations were actually made.

Statement of the Case and Applicable Statutory and Constitutional Provisions.

Appellant brought this action to recover Transportation Taxes, asserting, among other things, the incorrectness and unconstitutionality of the tax measure applied by appellee.

The California courts held that the Transportation Tax is measured by plaintiff's entire gross receipts from the transactions in issue under Revenue and Taxation Code §§ 9651,[1] and 9606.[2] The California courts held that such measure is constitutional.

Appellant takes this appeal on the ground that such tax measure is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States, which gives Congress power

> "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

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[1] "A license tax is hereby imposed upon operators at the rate of 3 per cent of the gross receipts of operators from operations." Cal. Rev. & Tax. Code § 9651.

[2] " 'Gross receipts' include all receipts from transportation operations entirely within this State and a proportion, based upon the proportion of the mileage within this State to the entire mileage over which such operations extend, of the receipts from operations passing through, into, or out of this State, or partly within and partly without this State. . . ." Cal. Rev. & Tax. Code § 9606.

ARGUMENT IN SUPPORT OF MOTION.

THE QUESTIONS ARE NOT SUBSTANTIAL.

Appellant is clearly subject to the Transportation Tax. He engages in both intrastate and interstate commerce in California. The tax here involved, for use of the highways of the state, measured by gross receipts of the operator using the highways may be imposed even on persons solely engaged in interstate commerce. *Aero Mayflower Transit Co. v. Railroad Commissioners,* 332 U.S. 495, 503 (1947). The only assertion of appellant is that the *measure* (*i.e.,* appellant's entire gross receipts) upon which he must pay transportation tax is, as to him, an unfair burden on interstate commerce.

The underlying principles were laid down by this court in *Western Livestock v. Bureau of Revenue,* 303 U.S. 250, 254-56 (1938):

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce, and if the property devoted to interstate transportation is used both within and without the state a tax fairly apportioned to its use within the state will be sustained. Net earnings from interstate commerce are subject to income tax, and if the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done

within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment.

All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. *The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed or added to with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce, . . .* [Numerous citations omitted. [Emphasis added.] 303 U.S. 254-256.

1. The Supreme Court Has Held That Taxation Measured by All Receipts From Interstate Transportation Performed Exclusively in One State Is Not an Undue Burden on Interstate Commerce.

Here all of appellant's activities were performed within the State of California. The goods hauled were carried by other independent carriers over the border and beyond this state. This occurred only after appellant completed his hauling or before appellant commenced his hauling. Appellant has had no contact with any other state which would allow any other state to tax appellant

on any of its receipts or on any other basis in connection with his interstate hauling. There is no possibility of a multiple burden on appellant from his participation in this interstate activity.

The Supreme Court has upheld the constitutionality of taxation measured by gross receipts from hauling activities of a taxpayer performed entirely in one state when the goods hauled were in interstate commerce. *Canton R. Co. v. Rogan*, 340 U.S. 511 (1950); see also *Aero Mayflower Transit Co. v. Railroad Commissioners*, 332 U. S. 495, 502 (1947) (upholding a gross receipts tax which applied "exclusively to [hauling] operations wholly within the state or the proceeds of such operations, although those operations are interstate in character.")

Further, the Supreme Court has held that a state may impose a tax upon the entire interstate commerce receipts of a carrier who moved *almost* entirely within one state. See discussion in *Central Greyhound Lines v. Mealey*, 334 U. S. 653, 657-60 (1948) of *Lehigh Valley Railroad Co. v. Pennsylvania*, 145 U.S. 192 (1891).

In *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 668 (1949), wherein a tax measured by gross receipts from operation (assumed to be interstate activity) of a pipeline wholly within the state, which pipe line was carrying oil in interstate commerce was upheld, it was stated:

> ". . . The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax."

Appellee submits that the foregoing cases uphold the constitutionality of the tax measure applied to appellant here.

2. The California Tax Law Has Constitutionally Allocated the Tax Measured by Appellant's Interstate Activities.

In *Central Greyhound Lines v. Mealey,* 334 U.S. 653 (1948), the Supreme Court upheld a tax measured by the carrier's gross receipts allocated between states on the basis of the mileage traveled by the carrier in the various states. In *Canton R. Co. v. Rogan,* 340 U.S. 511, 515-16 (1950), the court stated:

> ". . . It is settled that a nondiscriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the taxing state (see Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255) and not reaching any activities carried on beyond the borders of the state. Where transportation is concerned, an apportionment according to the mileage within the state is an approved method. Greyhound Lines v. Mealey, 334 U.S. 653, 663."

There (as here) the taxpayer operated entirely within one state, transporting goods in interstate commerce. Proration of his mileage necessarily allocated all receipts to that state.

The mileage proration provided under section 9606 (California Revenue and Taxation Code) of the California Transportation Tax Law allocates all appellant's gross receipts to California because all of appellant's mileage is in California. This is exactly the result approved in the *Canton R. Co.* case.

3. Use of Appellant's Receipts, Mileage and Operations in Measuring Tax Does Not Violate the Commerce Clause.

Appellant's primary contention appears to be that since he receives an agreed share of a through charge for each shipment, the *entire* through charge rather than appellant's own gross receipts *must* be used as the basis of the mileage proration in order to avoid an undue burden on interstate commerce. Appellant argues *as if* all participating carriers considered themselves to be a single taxpaying unit. However, this was not done. Each participating carrier, including appellant, has treated his activities as separate for the purpose of registering, reporting, and paying under the transportation tax law. This being so, appellant submits that each carrier's tax is properly determined on the basis of that carrier's *own* activities and gross receipts.

"Private agreements" among carriers are a proper means of determining an interstate carrier's gross receipts under the Transportation Tax Law just as they are the proper basis of determining his income under a state income or franchise tax law. Since the carrier is being taxed as an individual (separate from other carriers with whom he may interline or enter into other business ventures), the question of allocation arises only after the individual taxpayer's receipts are ascertained.

In *Lehigh Valley Railroad Co. v. Pennsylvania,* 145 U.S. 192 (1891), a tax was upheld where measured by the entire gross receipts of one of two railroads hauling under a through fare. The share was set by agreement between the two railroads. In *Central Greyhound Lines v. Mealey,* 334 U.S. 653, 658 (1948), the Supreme Court noted that the trial court in the *Lehigh* case had

found that the railroad's agreement was based upon mileage, but in analyzing its *Lehigh* decision this court referred to and relied upon the fact that the two railroads had *inter se* apportioned the receipts.

Appellant makes a number of statements suggesting that the California method of tax necessarily results in "multiple taxation" (*e.g.*, Jurisdictional Statement, p. 15). Regardless of the nature of appellant's activities in California as a participating carrier, the fact remains that all of appellant's activities take place in California. Thus there can be no multiple burden on appellant because of taxation by other states. Also, these statements are not supported by any evidence or facts and are incorrect. While it is true that different tax measures may result from allocation of each individual carrier's gross receipts rather than allocation of the sum of the receipts of all participating carriers, this difference may be lower or higher, depending upon the circumstances of the particular shipment being allocated.

None of the cases have suggested (as appellant does here) that each interstate shipment is "indivisible" and that allocation must be based on the total receipts of all participating carriers for the entire shipment. On the contrary, the Supreme Court found no burden on interstate commerce where oil was transported under through shipping orders and the state taxed all the receipts of one participating transporter where that transporter acted entirely within the taxing state. *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662 (1949). In *Canton Railroad Co. v. Rogan*, 340 U.S. 511 (1950), the same method of tax was upheld. The court did not deem it sufficiently material to mention whether the goods being shipped were traveling under through bills of lading or there was

a separate contract for the services performed by the taxpayer there involved. Ordinary business practices would suggest that the goods there involved were traveling under origin-to-destination documents. The facts that there were through "shipping orders" rather than through "bills of lading" in *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662 (1949) and the court did not mention the nature of the documents under which goods were traveling in interstate commerce in *Canton R. Co. v. Rogan,* 340 U.S. 511 (1950), or the possibility that the taxpayer's gross receipts in those cases may have been determined by some means other than the agreements among the carriers are not material distinctions from this case and do not cause those cases to be inapplicable here.

Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948), does not, as appellant suggests, hold that where several carriers participate in an interstate movement, the total receipts from that movement (called "through revenue" by appellant) must be considered in apportioning each taxpayer's liability to a particular state. Conversely, *Central Greyhound Lines* holds that the individual taxpayer's receipts must be fairly apportioned. This court did not discuss the source or manner of determining the taxpayer's gross receipts, the court did not mention whether the taxpayer performed the entire interstate movement or only a portion thereof in cooperation with other carriers.

Thus, appellee submits that the existing decisions of the Supreme Court establish that allocation of the receipts of an individual taxpayer who is participating in interstate commerce on the basis of that taxpayer's mileage is a proper allocation under the commerce clause.

In this case the California court found no undue burden on interstate commerce, because appellant, like the other participating carriers, was taxed on that proportion of his receipts which his California mileage bore to his total mileage. Appendix A to Jurisdictional Statement, page 4.

The result of the allocation as approved by the California court is in conformity with the foregoing principles pronounced by this court.

Conclusion.

The cases *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948), *Canton Railroad Co. v. Rogan*, 340 U.S. 511 (1950), *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662 (1949), and *Aero Mayflower Transit Co. v. Railroad Commissioners*, 332 U.S. 495 (1947), clearly establish that when a carrier such as appellant participating in interstate transportation operates solely within one state, the commerce clause allows that state to measure its taxes by such carrier's entire receipts. This constitutes proper allocation, and there is no danger of multiple burden on such carrier, because all his mileage (and other activities) are allocable to the one state. The method by which his gross receipts are determined does not affect the constitutionality of such meaure. It is respectfully submitted that this appeal should be dismissed.

Dated: This 28th day of January, 1965.

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